

2008

James Ivers; Katherine G. Havas; P and F Food Services v. Utah Department of Transportation : Reply Brief

Utah Supreme Court

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Recommended Citation

Reply Brief, *James Ivers; Katherine G. Havas; P and F Food Services v. Utah Department of Transportation*, No. 20080287.00 (Utah Supreme Court, 2008).

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IN THE UTAH SUPREME COURT

JAMES IVERS; KATHERINE G.
HAVAS; and P and F FOOD SERVICES,

Appellants,

vs.

UTAH DEPARTMENT OF
TRANSPORTATION,

Appellee.

APPELLANTS' REPLY BRIEF

Supreme Court Case No.

~~20060061-SC~~

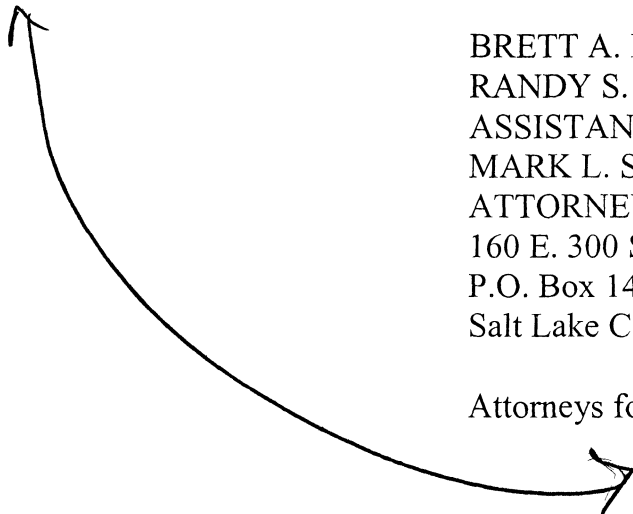
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FILED
UTAH APPELLATE COURTS
OCT 23 2003

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INTRODUCTION AND SUMMARY OF ARGUMENT

Appellee Utah Department of Transportation (referred to herein as “UDOT”), opposes this appeal by conflating and confusing the two rulings entered by the district court in connection with UDOT’s motion in limine. The district court’s initial reaction to UDOT’s motion in limine, as set forth in its October 18, 2007 ruling (“October Ruling”), was to construe it as an untimely motion to amend pleadings. October Ruling, Record on Appeal (“R.”) at pp. 393 & 394. Given the October Ruling, the district court’s analysis should have ended there, regardless of whether UDOT’s underlying substantive argument about prior deeds had merit. However, after determining it was too late for UDOT to raise the new issue, the district court’s October Ruling inexplicably went on to delve into further analysis regarding the prior deeds and whether evidence could be admitted about the foreseeability of the subject construct project at the time Arby’s predecessors executed deeds.

Arby’s moved the district court to revise its October Ruling by simply ending its analysis at the point it determined UDOT’s motion to amend was untimely. Memo. Opp. to UDOT’s Request to Alter & Amend and in Supp. Cross Mot. to Revise Ruling, R. at pp. 432-38. If the district court considered it too late for UDOT to raise new arguments, there was no reason for the court to go into any further inquiry.

When the district court entered its February 5, 2008 ruling (“February Ruling”) on

the parties' cross-motions to revise and alter the October Ruling, it agreed with Arby's that with respect to the issue of the timeliness of UDOT's attempt to raise new theories, it should have previously ended its analysis by finding it was too late for UDOT to amend its pleadings to assert the prior deeds issue. February Ruling, R. at p. 468.

While the district court maintained its position that UDOT's motion in limine was an untimely motion to amend, its revised decision boiled down to its interpretation of UTAH CODE ANN. § 78-34-11(2),¹ a statute UDOT failed to raise until it filed its motion to amend the October Ruling. According to the district court, UTAH CODE ANN. § 78-34-11(2) gave UDOT the power to unilaterally amend its taking at anytime. February Ruling, R. at p. 470. By allowing UDOT to use UTAH CODE ANN. § 78-34-11(2) to exclude appurtenant rights from the taking, the district court determined Arby's no longer has a basis to seek severance damages. Arby's submits the district court's application of UTAH CODE ANN. § 78-34-11(2) is in error and should be reversed. Moreover, the ruling below should be reversed because it is a product of the district court's failure to follow this Court's mandate upon remand following the prior appeal.

Finally, due to UDOT's conduct, this case presents a type of exceptional circumstances justifying this Court's consideration of Arby's request that the valuation

¹ Since this matter was appealed, this statute has been recodified as UTAH CODE ANN. § 78B-6-512(2).

date be adjusted, even if the issue was not raised in the court below.

ARGUMENT

POINT 1

THE DISTRICT COURT'S RULING BELOW WAS NOT BASED UPON THE PURPORTED IMPACT OF PRIOR DEEDS

UDOT's Brief relies heavily upon the district court's October Ruling, which was subsequently revised by the February Ruling. UDOT argues the district court ruled the alleged prior deeds that were the basis of its motion in limine preclude Arby's from pursuing severance damages. Moreover, UDOT claims that because Arby's has not contested the trial court's alleged ruling concerning the deeds on appeal, the matter has now been foreclosed.²

UDOT's argument is incorrect and reflects its confusion over the district court's October and February Rulings. Regardless of whether there was any merit to UDOT's argument that the prior deeds had foreclosed Arby's severance damages claim, the district court ruled it was too late for UDOT to raise the claim and denied UDOT's motion in

² Because UDOT has chosen to argue about the prior deeds in its Brief, the two cases it cites: *State v. Brown*, 853 P.2d 851 (Utah 1993) and *Gildea v. Guardian Title Co. of Utah*, 31 P.3d 543 (Utah 2001) are inapplicable to prevent Arby's from responding to UDOT's argument. See also *Romrell v. Zions First Nat'l Bank*, 611 P.2d 392, 395 (Utah 1980) (the appellate court has discretion to decide a case upon any point that its proper disposition may require, even if first raised in a reply brief.).

limine.³ October Ruling, R. at pp. 394, 396 & 399. With that determination, the analysis should have ended. Unfortunately, the district court went on to consider other issues that had become moot as a result of its ruling UDOT was too late in raising new issues. The district court's perplexing October Ruling prompted both sides to file motions to revise or amend the ruling.

In its February Ruling, entered after both sides filed their respective motions to revise, alter or amend the October ruling, the district court agreed with Arby's that in retrospect, its analysis should have ended with its determination that UDOT's motion in limine constituted an untimely motion to amend. February Ruling, R. at p. 468. The court held:

It is clear that UDOT does not agree with the Court's initial ruling on the issue, but UDOT has provided no additional analysis to show that its motion in limine was not acting as a motion to amend, *and the Court declines to amend its initial ruling based on the argument that the motion in limine was not acting as a motion to amend.*

Id. at p. 466. (Emphasis added).

The district court went on to add that "[o]nce the Court ruled that the motion in limine was in reality acting as a motion to amend, the issue was properly disposed of, and the Court should not have engaged in the foreseeability analysis." *Id.* at p. 468. In short,

³ UDOT attempted to camouflage what was clearly a motion to amend pleadings by

the district court's position was that regardless of the merits of UDOT's arguments based upon the prior deeds, the analysis should have ended upon determining it was too late for UDOT to assert new arguments.

The district court's February Ruling was based upon its interpretation of UTAH CODE ANN. § 78-34-11(2). It is important to observe that consistent with its practice in this case of holding back arguments, UDOT never mentioned UTAH CODE ANN. § 78-34-11(2) in connection with its motion in limine. Instead, the statute was only mentioned briefly when UDOT filed its motion to alter or amend the district court's October Ruling. Despite the district court sticking to its prior decision regarding the untimeliness of UDOT's proposed amendment, its February Ruling held that under the statute, the legislature had given UDOT the unilateral authority to amend a taking at any time. Based upon that interpretation of UTAH CODE ANN. § 78-11-34(2), the district court deemed the taking amended so as to remove appurtenant rights, eliminating Arby's claim for severance damages. Not only is this decision unsupported by the plain language of the statute (*see infra* Point 4), the decision is inconsistent with the court's determination that it was too late for UDOT to bring up new arguments. It is also inconsistent with this Court's mandate when the case was remanded to the district court following the prior appeal. *See infra* Point 3. The district court's decision appears to have been driven by its

labeling it a motion in limine.

concern that if it ruled otherwise, it would be reversed on appeal. February Order, R. at p. 470.

In short, contrary to the impression UDOT attempts to convey, the district court's ultimate determination was not based upon an analysis of the prior deeds, but its interpretation of the statute UDOT raised at the last minute. The district court, in connection with the February Ruling reaffirming its prior decision that it was too late for UDOT to seek to amend its complaint, even described the application of UTAH CODE ANN. § 78-34-11(2) as "the only issue remaining in this case." *Id.* at p. 469. Moreover, the written order dated March 20, 2008 expressly incorporates the district court's February Ruling, not the prior October Ruling. Order, R. at pp. 473-75. Despite this, UDOT spends pages in its Brief citing the October Ruling in an effort to direct the focus of this appeal to the prior deeds issue,⁴ which was not the basis of the district court's ruling.

⁴ UDOT makes legal arguments based upon the prior deeds in the section of its Brief entitled: "Statement of Facts." UDOT's Brief at pp. 5-7. Arby's should not be precluded from responding to these legal arguments asserted by UDOT in its Brief. *See supra* n. 3.

POINT 2

UDOT'S ARGUMENTS BASED UPON PRIOR DEEDS SHOULD BE REJECTED

The district court's holding was *not* based upon its interpretation of the prior deeds. However, even if the substance of UDOT's arguments about the prior deeds is considered the basis for the district court's ruling, the ruling should be reversed.

UDOT argues the conveyances made by prior grantors severed all appurtenant rights from the small parcel of property Arby's eventually came to own. UDOT's Brief, p. 5. In other words, UDOT claims that decades before the elevated U.S. 89 was built, the parties intended, by virtue of warranty deeds that conveyed specifically identified real property in connection with constructing a public highway, to relinquish any and all appurtenant rights of air, light and view of the "remaining property." The pertinent language of the deeds is as follows:

To enable the grantee to construct and maintain a public highway as an expressway ..., the grantors hereby release and relinquish to the grantee any and all rights or easements appurtenant to the grantors [sic] remaining property *by reason of the location thereof* with reference to said highway (Emphasis added).

UDOT's Brief at p. 5; Exhibit "A" to UDOT's Memo. in Supp. of Mot. in Limine, R. at p. 328.

A clear reading of the warranty deeds contradict UDOT's arguments. First, the deeds and related documents pertain to access and are even subtitled "controlled access." R. at pp. 328-343.

Second, the documents specifically state that appurtenant rights and easements are released "to enable [UDOT] to construct and maintain a public highway as an expressway" There is nothing about any elevated highway. The hallmark of an expressway or limited access facility is that it is "especially designed for through traffic." UTAH CODE ANN. § 72-1-102(11). In order for the highway to be "especially designed for through traffic," access to the highway has to have some limitations. However, the appurtenant right of view has nothing to do with whether the highway has "through traffic" or not. It is almost as if UDOT argues that if real estate is taken for a limited access facility, it automatically means that any and all appurtenant rights are relinquished, whether the owner realizes it or not. Such cannot be the case. The condemning authority should not be permitted to take more property than what is absolutely required. *Pfeifer v. City of Little Rock*, 57 S.W. 3d 714, 720 (Ark. 2001).

Third, the plain language of the boilerplate provision in the subject warranty deeds provides that any release of appurtenant rights is based upon the "location"⁵ of the

⁵ BLACK'S LAW DICTIONARY (5th ed. 1979) defines "location" as "the designation of the boundaries of a particular piece of land" This definition supports Arby's argument

highway in reference to the remaining property. In 1961, the location of the subject highway was at grade. There was no issue of loss of view with U.S. 89 at grade. There is no evidence to suggest that an elevated and expanded U.S. 89 was contemplated at the time the grantors executed the subject warranty deeds and right of way agreements. There is nothing in the documents themselves referencing plans that would be developed almost half a century later to engage in a completely new construction project to elevate the expressway, blocking the view of the property owners who would be forced to contribute part of their property so that U.S. 89 could be elevated. In other words, whatever rights were relinquished, they were relinquished under the facts and circumstances at the time. They were not released in reference to unknown construction projects that might arise in the distant future involving the raising of U.S. 89 over Shepard Lane. *See Hartman v. Potter*, 596 P.2d 653, 656 (Utah 1979) (A deed must be construed in light of its own language and peculiar facts).

There are principles from cases decided in other jurisdictions that support Arby's position in this matter. First, it has been held it is not necessary to explicitly reserve in a deed an appurtenant easement. *See Wenton v. Commonwealth*, 138 N.E. 2d 609, 611 (Mass. 1956). *See also Webb v. Maine – New Hampshire Interstate Bridge Auth.*, 152

that the subject warranty deeds had to do with the location on the ground, not an elevated expressway.

A.2d 521, 524 (N.H. 1959). Therefore, the fact there was no reservation of the appurtenant right of view does not mean the prior grantors intended to relinquish it through UDOT's boilerplate deed language.

POINT 3

THE DISTRICT COURT FAILED TO FOLLOW THE UTAH SUPREME COURT'S MANDATE UPON REMAND

Whether UDOT had been conveyed appurtenant property rights at some point prior to filing this condemnation action is a basic, threshold question. If UDOT already owned these property rights, its argument should have been raised at the outset of this case. Presumably, when UDOT takes on the very serious work of condemning the constitutionally protected property rights of private owners, it engages in a careful and comprehensive investigation to determine the property rights it seeks to condemn. With respect to this case, UDOT's own Complaint and Condemnation Resolution clearly provide it was seeking to condemn all rights appurtenant to Arby's remaining property. Condemnation Resolution, R. at p. 7.⁶ It constitutes a troubling waste of resources that UDOT waited until after a lengthy appeals process and this Court's prior decision before abruptly changing course and arguing Arby's has never owned the very appurtenant rights

⁶ Plaintiffs are bound by what is alleged in Complaint. *Powell v. Clay County Bd. of Supervisors*, 924 So 2d 523, 527 (Miss. 2006).

that have been the subject of this protracted severance damages case.

Both Arby's and this Court proceeded in the prior appeal based upon the way UDOT framed the issues through the contents of its Complaint and the Condemnation Resolution. There was never any indication during these prior proceedings UDOT would suddenly attempt to argue Arby's appurtenant property rights had already been conveyed to UDOT. UDOT never challenged Arby's ownership nor did anything to preserve that issue before the prior appeal. That Arby's owned the appurtenant property rights was subsumed by this Court when it decided the prior appeal.⁷

In light of the foregoing, this Court was very specific in its mandate to the district court upon remand. The court was to conduct further proceedings to determine whether the taking of Arby's property was "essential" to UDOT's project. *Ivers v. Utah Dept. of Transp.*, 154 P. 3d 802, 808 (Utah 2007). Because UDOT readily admitted the taking was essential, the district court should have simply proceeded with determining the amount of Arby's severance damages. However, rather than following this Court's mandate, the district court turned control of this case over to UDOT pursuant to UTAH

⁷ The type of conduct engaged in by UDOT in this case typically constitutes a waiver. For example, in *Sales v. Grant*, 224 F.3d 293 (4th Cir.), the court held the defendants waived their right to assert an affirmative defense based upon qualified immunity because they had failed to press that claim until after the case had been remanded to the lower court following a prior appeal. Under the facts and circumstances of the present matter, UDOT has similarly waived any right to raise new arguments following remand.

CODE ANN. § 78-34-11(2), once again precluding Arby's from obtaining just compensation as required under the constitution.⁸

UDOT relies upon *Madsen v. Washington Mut. Bank*, 2008 WL 4299622 (Utah) for the proposition that it was proper for the district court to consider newly-raised arguments following remand. However, *Madsen* is distinguishable from the present matter. In that case, following remand, a federal preemption claim was considered. However, federal preemption *was not* a new issue. It had been preserved because it was raised before the appeal. *Id.* at ¶ 16, n. 18. In the present matter, the parties and the various courts involved have always operated under the assumption Arby's had property rights upon which it could base a claim for severance damages. UDOT's pleadings even acknowledged this. Only after the Utah Supreme Court ruled in the prior appeal did UDOT choose to take a contrary position and make its never-before-made arguments. In short, UDOT never did anything in this case to preserve the arguments it asserted post-remand.⁹

⁸ As this Court observed in *Street v. Fourth Judicial Dist. Court*, litigation would never come to an end if parties are permitted to amend and supplement pleadings following remand to "frame and try rights already settled." 191 P.2d 153, 158 (Utah 1948).

⁹ UDOT also cites *Call v. City of West Jordan*, 727 P.2d 180 (Utah 1986) for the proposition a complaint can be amended after remand. *Call* is distinguishable from the present matter because UDOT failed to raise the threshold issue of property ownership at the beginning of the case. This case then proceeded under the assumption Arby's owned appurtenant rights. The prior ruling of this Court was entered on that uncontested

The district court should be reversed for exceeding this Court's mandate upon remand.

POINT 4

THE DISTRICT COURT MISAPPLIED UTAH CODE ANN. § 78-34-11(2)

Rather than responding to Arby's analysis regarding UTAH CODE ANN. §78-34-11(2), UDOT's Brief contains an abbreviated argument that Arby's did not claim the statute is ambiguous and did not "suggest a correct interpretation." UDOT Br. at p. 12. UDOT is correct that the statute is not ambiguous. However, UDOT is incorrect that Arby's failed to explain how the district court erred in interpreting and applying the statute. Pages 15 through 20 of Arby's Brief set forth Arby's analysis. The simple fact is that the statute does not apply. UDOT did nothing to reduce the property actually taken from Arby's or to mitigate damages, both of which are required to be considered by the court or jury in assessing compensation. UTAH CODE ANN. § 78-11-34(2). The statute does not say UDOT can amend its pleadings at any time to create a new basis to circumvent the constitution and refuse to pay severance damages.

UDOT has chosen not to respond directly to Arby's arguments. For the reasons

assumption. UDOT did nothing to reserve the issue of whether Arby's actually owned those appurtenant rights. Under the history of this case, it cannot be said that this issue was left open on remand. UDOT's practice of "shifting theories" should not be condoned

previously argued by Arby's, UDOT should not be allowed to manipulate UTAH CODE ANN. § 78-34-11(2) as a tool to avoid paying severance damages to property owners. However UDOT wants to construe the statute, it does not change the fact the subject construction project was built, and caused Arby's to suffer damages.

POINT 5

CIRCUMSTANCES WARRANT A CHANGE IN THE DATE OF VALUATION

Arby's acknowledges its argument concerning the date of valuation is being raised for the first time in this appeal. However, as the authorities UDOT relies upon point out, the general rule that arguments cannot be made for the first time on appeal is not absolute. There are "limited exceptions" to the rule. *See Espinal v. Salt Lake City Bd. of Educ.*, 797 P. 2d 412, 413 (Utah 1990).

Exceptional circumstances justify an appellate court considering an issue for the first time on appeal. *Utah v. Sepulveda*, 842 P. 2d 913, 917 (Utah 1992). Arby's submits there are exceptional circumstances involved in this case that warrant the Supreme Court's consideration of this matter. As the district court has pointed out, UDOT has engaged in a strategy of "shifting theories" in this case in reaction to rulings it doesn't like. February Ruling, R. at p. 469. The district court labeled UDOT's strategy as

by this Court.

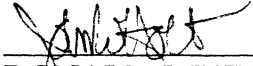
“inappropriate” and a waste of valuable resources. *Id.* UDOT’s assertion of new arguments has led to this latest appeal. Arby’s plea for the right to recover severance damages has already been in front of the Utah Court of Appeals and the Utah Supreme Court before this present appeal. If the issue of timing of valuation is left to the district court upon remand, it only invites yet another appeal. That unnecessary, lengthy and expensive process can be avoided if this Court rules upon the valuation issue in the present appeal. Deciding the issue doesn’t require any more information than the Supreme Court already has before it and the issue is closely related to what is already before the Court.

CONCLUSION

Based upon the foregoing and the arguments made in Arby’s opening Brief, the Supreme Court should reverse the ruling of the district court.

Respectfully submitted this 23rd day of October, 2008.

WINDER & COUNSEL, P.C.

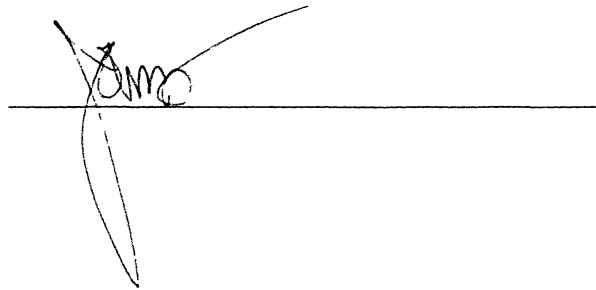


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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of October, 2008, a true and correct copy of the foregoing Appellants' Reply Brief was mailed, postage prepaid, to the following:

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A handwritten signature, possibly "JMC", is written over a horizontal line. A large, loopy flourish extends from the bottom of the signature, crossing the line and extending downwards.